Maritime Pte Ltd v Mohar Shipping Corp Pte Ltd

HIGH COURT (SINGAPORE) — SUIT NO 2058 OF 1989
KARTHIGESU JC
31 JULY 1990

Civil Procedure — Mareva injunction — Defendants a company of little substance — Injunction granted against defendants' only asset — Whether injunction should be discharged on a balance of convenience

The plaintiffs were the owners of a barge which they had chartered out to the defendants. When the defendants failed to pay the charterhire and to repair the barge after it was damaged, in breach of their agreement, the plaintiff started the present action. The plaintiffs were granted a Mareva injunction against the defendants removing out of jurisdiction their vessel which was undergoing repairs in Singapore. The defendants appealed against this order and applied to discharge the injunction on the grounds of the balance of convenience and for material non-disclosure by the plaintiffs.

Held, dismissing the defendants' appeal:

(1) The defendants' argument that although theirs was a $3 company, they had satisfied all outstanding obligations through obtaining a loan from a director, was unacceptable. There was no guarantee that the directors would forever stand behind the defendant company.

(2) The defendants' argument that since their sole asset, the vessel under injunction, came back to Singapore in connection with their trading activities there was no danger of the defendants transferring their assets out of jurisdiction was fallacious. The court found that there was nothing to prevent the owners keeping the ship out of the court's jurisdiction.

(3) The arguments that it made no commercial sense to restrain a vessel worth some ten times the claim when the vessel could be earning charterhire to pay the plaintiffs' claim, if successful, was unfounded since the vessel was the defendants' only asset and not in a fit state of repair.

(4) The allegations of the plaintiffs' non-disclosure in applying for the injunction were unfounded. Since the plaintiffs had a good arguable case and the other requirements for a Mareva injunction were satisfied, the appeal would be dismissed with costs.

S Selvadurai for the plaintiffs.
Alan Wong for the defendants.

Cur Adv Vult

Karthigesu JC:The plaintiffs are the owners of the Singapore registered deck cargo/ballast barge, 'Vigorous Mariner' ('the barge'). By a bareboat charterparty in writing in the standard bareboat charter form, Barecon A, dated at Singapore, February 1989 to which eight additional clauses covering special provisions were agreed by way of an addendum ('the charter'), the defendants chartered the barge from the plaintiffs for a period of four months with one option to extend for a further period of five months.

The charterhire payable was $43,000 per month of 30 days, seven days in advance of the expiry of the previous month of 30 days. A deposit of $43,000 and the first month of 30 days charterhire was payable on the commencement of the charter. All payments were guaranteed by a director of the defendants, namely, Sarjit Singh. The charter is governed by Singapore law and provides for arbitration in Singapore as the appropriate forum for the resolution of disputes arising out of the charter.

Clause 1 of the charter provides, inter alia, as follows:

> ... The delivery to the Charterers of the Vessel and the taking over of the Vessel by the Charterers shall constitute a full performance by the Owners of all the Owners' obligations hereunder, and thereafter the Charterers shall not be entitled to make or assert any claim against the Owners on account of any representations or warranties expressed or implied with respect to the Vessel but the Owners shall be responsible for repairs or renewals occasioned by latent defect in the Vessel, her machinery or appurtenances, existing at the time of delivery under the Charter, provided such defects have manifested themselves within 18 months after delivery unless otherwise provided...

Clause 13 of the charter provides, inter alia, as follows:

> ...The Vessel shall be re-delivered to the Owners in the same or as good structure state, condition and class as that in which she was delivered, fair wear and tear not affecting class excepted...

Special clause 26, 30 and 33 provide as follows:

> 26 The Charterers has inspected the Vessel and has confirmed that the Vessel at its present condition is suitable for Charterers' purposes.
>
> Upon delivery of the Vessel to the Charterers, the Charterers shall assume full responsibility of the Vessel and shall pay for all expenses pertaining to the Vessel until its redelivery to the Owners.
>
> The Charterers shall not be entitled to claim for any expenses of any nature against the Owners pertaining to the Charter of the Vessel.
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> 30 On and off hire surveys shall be conducted by mutually approved surveyors and all costa incurred therein shall be borne equally between the Owners and the Charterers.
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> 33 Notwithstanding any of the above Clauses, the Charterers will be responsible and pay to any damage and resultant deterioration of the deck except fair, wear and tear due to carriage of cargoes during the Charter Period such assessment of damage will be established in comparison between the on and off hire survey undertaken by mutually appointed surveyor. In events of damage, charter hire will continue until satisfactory completion of all repairs.

The charter provided for delivery and redelivery of the barge at Singapore and more specifically at No 7 Pandan Road, Singapore 2260 and further provided that the return of the barge on termination of the charter to be between 8am to 5pm o weekdays or 8am to 12 noon if on a Saturday and that redelivery shall not be on a Sunday or a Singapore public holiday (see cl 31).

By the terms of the charter the defendants were to take delivery of the barge at 12 noon on 18 February 1989 and did so following a joint 'on-hire' survey on 16 February 1989.

It is not in dispute that during the period of the charter and when the barge was on a voyage from Kantang in Thailand to Colombo, Sri Lanka laden with a cargo of gypsum she suffered a casualty on or about 20 May 1989, listed heavily to starboard and lost 90% of the cargo and had to be towed back to Kantang. The plaintiffs believed that the barge suffered a further casualty when she was towed back to Kantang in the at she grounded at the mouth of a river near Kantang. She was then refloated and brought back to Singapore in a damaged condition.

The plaintiffs further alleged that following the casualty the defendants in breach of the terms of the charter failed to pay the charterhire for the barge until she was fully repaired and in further breach of the charter failed to take any steps whatsoever to restore the barge to the condition she was in at the commencement of the charter. In the circumstances, the plaintiffs were compelled to accept the defendants' conduct as a breach or repudiation of the charter and accordingly treated the deposit of $43,000 as having been forfeited and in mitigation of their loss proceeded to have the barge repaired in order to restore her to operating condition at the shipyard of Unifrance Offshore Engineering Pte Ltd, a sister company of the plaintiffs, both being wholly owned by Maritime Holdings Ltd.

The $114,923 claimed in these proceedings is the cost of repairs and survey fees which the plaintiffs have incurred in restoring the barge to operating condition.

The defendants who entered an appearance to this suit on 22 November 1989 applied by summons which they filed on 16 December 1989 for a stay under s 7 of the Arbitration Act (Cap 10, 1985 Ed) having regard to the arbitration clause in the charter. For one reason or another, the defendants' application for a stay was not due to be heard until 11 May 1990. It was in fact ultimately heard on 25 May 1990 when an order staying those proceedings was made. The plaintiffs have appealed against that order which is listed for hearing on 16 October 1990.

On 10 May 1990, the plaintiffs applied ex parte for a Mareva injunction restraining the defendants from removing out of the jurisdiction or otherwise disposing of or in dealing with their vessel 'Dos Amigos' of the Port of Honduras at present undergoing reports at Franklin Offshore Supply & Engineering Pte Ltd, No 4 Jalan Besut, Singapore 2261. The order was duly made.

On 21 May 1990, the defendants applied by summons to discharge the Mareva injunction. I heard this application on 8 and 11 June 1990 and after hearing arguments of counsel dismissed the defendants' application with costs. The defendants have now appealed.

The plaintiffs' affidavit in support of the ex parte application for the Mareva injunction was made by its financial controller from which I have extracted the basic facts I have recited above.

The further facts he deposed to in that affidavit are these:

(1) The defendants refused to pay Unifrance Offshore Engineering Pte Ltd three invoices related to the repairs to restore the barge to operational condition. These invoices which were exhibited detail each item of work done to the barge (para 7);

(2) that the defendants had commenced proceedings against the underwriters, India International Insurance Pte Ltd claiming among other things the cost of repairs which they had already refused to pay. However the underwriters had repudiated liability on the grounds of unseaworthiness due to overloading at Kantang prior to proceeding to Colombo (paras 8 and 10);

(3) that the plaintiffs themselves had commenced action against the same underwriters to indemnify them for the cost of repairs to restore the barge to the condition she was in prior to the charter (para 9);

(4) that an analysis of the defendants' balance sheet for 1989 (which was exhibited) showed the defendants to be financially in no position or in a dangerously weak position to discharge their indebtedness or satisfy any judgment or award that might be made against them; that they were grossly undercapitalized with an issued capital of $3 and accumulated losses exceeding its capital by $28,434; that there were no reserved and that even an overdraft of $100,000 was secured by the personal guarantee of one of its directors (paras 13 and 14);

(5) that the auditors report of the affairs of defendants for 1988 was 'qualified' (para 16);

(6) that the vessel 'Dos Amigos' which the defendants owned was registered in Honduras and that the plaintiffs themselves had been approached four or five weeks previously to the date of the affidavit (ie April 1990) to carry out certain repairs to her (paras 18 and 19);

(7) that the 'Dos Amigos' presently was at the shipyard belonging to Franklin Offshore Supply & Engineering Pte Ltd which is in the vicinity of the plaintiffs' shipyard (para 20);

(8) that the Honduras flag was a flag of convenience and that the plaintiffs believed that the 'Dos Amigos' was the defendants' only asset which the plaintiffs believed could be put out of the reach of the plaintiffs (para 21);

(9) that the defendants had applied to court for a stay of the plaintiffs' action on the ground of the arbitration clause in the charter (para 22).

The defendants' application to discharge the Mareva injunction was supported by the affidavit of Sarjit Singh, a director of the defendants, filed on 21 May 1990. It will be

useful to summarize what is said in that affidavit as the defendants' counsel's arguments for seeking a discharge of the mareva injunction were based on what is said there. Sarjit Singh deposed:

(1) that the ex parte application for the Mareva injunction was made six months after the commencement of the action without notice to the defendants' solicitors (paras 2 and 3);
(2) that there was no evidence that the defendants were about to remove their assets out of the jurisdiction of the court. Indeed the evidence was otherwise as the defendants' vessel (Dos Amigos) was in Singapore undergoing repairs (para 4);
(3) that a Mareva injunction was unnecessary as the defendants had commenced legal proceedings against the underwriters and although the underwriters had disputed liability on the grounds that the barge was overloaded there was in fact no overloading. The plaintiffs too had commenced proceedings against the same underwriters. 'In time to come the insurance company will have to settle the claim in which case the plaintiffs' damages will be settled by the insurance company as it was fully covered by the insurance policy.' (para 4(a));
(4) that the plaintiffs' solicitors themselves had suggested that the defendants should drop that part of the claim in respect of which the plaintiffs had sued the underwriters in favour of the plaintiffs thus acknowledging that the plaintiffs realized that the underwriters will ultimately settle the claim for the repair costs and accordingly the Mareva injunction was unnecessary (para 4(a));
(5) that the plaintiffs had not brought to the notice of the judge (4) above and this amounted to non-disclosure of a material fact (para 4(a));
(6) that restraining the 'Dos Amigos' in Singapore made no commercial sense as this deprived the defendants of earning charterhire;
(7) that the weakness of the defendants' financial position was not valid reason in law for granting a Mareva injunction. Even if it were, there was no evidence of the defendants dissipating or removing their assets out of the jurisdiction of the court. The defendants had lucrative shipping contracts and that in 1989 had a business turnover of $2,255,411 (para 4(b));
(8) that the defendants have fully settled outstanding judgment debts (para 4(b));
(9) that the defendants were financed by director's loans which could be turned into equity in which case the defendants would have a paid-up capital of $110,000 (para 4(b)) and that the plaintiffs were not entitled to forfeit the deposit of $43,000 as the defendants were not in breach of the charter (para 4(b));
(10) that the plaintiffs' claim was based on the cost of repairs and there was overcharging. Furthermore no estimate or valuation of repairs was ever given to the defendants. The defendants estimated the total cost of repairs at no more than $25,000 (para 4(c));
(11) that there were many areas of dispute over the alleged repairs. These disputes were peculiar between the plaintiffs and the defendants and independent of the plaintiffs' claim against the insurance company. Accordingly the plaintiffs' claim against the defendants benefitted neither and on the balance of convenience the Mareva injunction ought to be discharged (para 4(c));
(12) that the plaintiffs failed to make frank and full disclosure and in any event the plaintiffs themselves have a current liability of $5,630,968 and an accumulated loss of $1,838,176. The plaintiffs will not be able to compensate the defendants' damages although they have given such an undertaking (para 4(d));
(13) lastly, that the plaintiffs and the defendants are both competing for shipping contracts in Sri Lanka. The plaintiffs in applying for the restraining order are acting in mala fides to prevent the defendants from tendering for a time charter with the Ceylon Petroleum Corp (para 5).

The plaintiffs' affidavit in rebuttal filed on 31 May 1990 contained two salient points, namely:

(a) that the defendants' vessel ' Dos Amigos' had been lying idle at the shipyard of Franklin Offshore Supply and Engineering Pte Ltd for the past eight weeks with no repairs being done to her (para 5); and
(b) that the plaintiffs have a healthy capital balance; that loans to the plaintiffs are fully secured by the vessels which the plaintiffs own; that for the period ended April 1990 the plaintiffs made a profit of $709,480.

No attempt was made to contradict these two points and in fact the defendants' counsel conceded that the defendants had no evidence to support their allegation that the plaintiffs were acting in mala fides to prevent the defendants from tendering for a time charter with the Ceylon Petroleum corp. It was only a belief.

The principal arguments of the defendants were that the Mareva injunction ought to be discharged on what was said to be a 'balance of convenience' and for material non-disclosure.

The 'balance of convenience' argument was that the plaintiffs could not make good their undertaking as to damages as their financial position was as precarious, if not more so, than the defendants. This argument in my view was not supported by the facts.

Further it was argued, that the fact the defendants were a $3 company and operating at a loss was not a valid enough reason for granting a Mareva injunction. The defendants had satisfied all outstanding judgments against them albeit through director's loans so there was no reason

to suppose that the defendants would be or were unable to satisfy any judgment that may be entered against them by the plaintiffs. I found this argument wholly unacceptable as the defendants' ability to satisfy judgments was dependent on the willingness and the ability of the directors to finance the defendants. There was no guarantee that the directors would forever stand behind the defendants.

Still further it was argued that the plaintiffs must show that there was a danger of the defendants transferring their assets out of the jurisdiction of the court. The 'Dos Amigos', the defendants submitted, came back to Singapore in connection with its trading activities. Even if this were true the fallacy of this argument is that from its very nature a ship has to sail the high seas to be profitable to its owners and once out of the court's jurisdiction there was nothing to prevent its owners from keeping her out of the court's jurisdiction. The defendants do not deny that the 'Dos Amigos' is their only asset. This argument did not impress me at all.

Lastly, it was argued that it made no commercial sense to restrain a vessel worth about $1m to satisfy a claim of $114,000 odd when the vessel could be earning charterhire for the defendants which will enable them to pay the claim if they were found liable. There is some substance in this argument were it not for the fact that the 'Dos Amigos' was the only asset of the defendants and that she was not in a state, without undergoing repairs, to be chartered out and the further evidence that the defendants were really in a precarious financial situation. Be that as it may, I would have been prepared to discharge the Mareva injunction had the defendants offered other acceptable security for a sum of at least the amount of the claim. Unfortunately none was forthcoming from the defendants.

In the circumstances, I could not and did not accept this argument.

The material non-disclosure point was that the plaintiffs had not disclosed in their first affidavit filed in support of the ex parte application a telex from the defendants to the plaintiffs dated 15 June 1989 which reads as follows:

(1) We are in receipt of your invoices 2623, 2622 to 2621, repair works on 'Vigorous Mariner'. These have been submitted to the insurers for their necessary action.
(2) We hereby put you on notice that we feel the bills are too high and we intend to request for a substantial reduction according to prevailing market prices.

The submission is that if this telex was before the learned judge he probably would not have granted the Mareva injunction.

I cannot agree. This telex does not dispute liability for the repairs. It merely complains that the charges are too high and a substantial reduction will be claimed notwithstanding that payment is sought from the insurers.

I do not consider the failure to disclose this telex material, such that the judge would have been persuaded to refuse a Mareva injunction provided that the essential conditions for granting a Mareva injunction were present.

It was further submitted that three other telexes said to be material were not disclosed. They are:

(1) from the Insurers' adjusters to the plaintiffs saying that there was no objection to the owners (plaintiffs) carrying out repairs dated 8 June 1989;
(2) from the plaintiffs to the defendants dated 26 May 1989 putting the defendants on notice that they will be held responsible if they failed to take steps to save the barge from irreparable loss or damage following the casualty;
(3) from the defendants to the plaintiffs dated 27 May 1989 when the defendants informed the efforts at very high costs to salvage the barge.

I regret I do not understand from defendants' counsel's arguments how these telexes could be material to the granting of a Mareva injunction.

From the evidence contained in the affidavits I have summarized above, I was satisfied that the plaintiffs had a good arguable case, this being a bareboat charter; that the defendants had assets within the jurisdiction, namely, the 'Dos Amigos'; that there was apprehension that the defendants if not restrained might deal with their only asset to put it out of the reach of the plaintiffs, leaving the plaintiffs, should they obtain a judgment, with no assets available or traceable to enforce their judgment or award and that the defendants have not shown that they have assets, apart from the 'Dos Amigos', within the jurisdiction to satisfy a judgment.

I therefore dismissed the defendants' application to discharge the Mareva injunction with costs. I do not feel it necessary to belabour this judgment with the detailed legal arguments in support of the essential conditions for granting a Mareva injunction advanced by the plaintiffs' counsel. Suffice it to say that in my view they were well founded.

Application dismissed.

Solicitors: *S Selvadurai; William Lai & Alan Wong.*

Reported by *Terence Tan Bian Chye*